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SUPREME COURT, U.S.
FILED
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UNITED STATES SUPREME COURT.
OCTOBER TERM, 1883.
No. 277.

WILLIAM ASTON,
Plaintiff in error
against
EDWIN A. MERRITT, Collector, &c.,
Defendant in error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

LORD, DAY & LORD,
Attys for Plff. in error.

GEORGE DEFOREST LORD,
Of Counsel.

U. S. Supreme Court.

WILLIAM ASTOR, Plaintiff in error, *vs.* EDWIN A. MERRITT, Collector, &c. Defendant, in error.	October Term, 1883, No. 277.

Brief on behalf of the Plaintiff in Error.

ABSTRACT OF CASE.

This action was originally commenced in the Supreme Court of the State of New York, whence, on the defendant's motion, it was removed to the U. S. Circuit Court, sitting in and for the Southern District of New York. 3

It was brought to recover back certain duties paid by the plaintiff, under protest, to the defendant as Collector of the Port of New York, in September,

1878, upon certain 'wearing apparel and personal effects" belonging to the plaintiff, and constituting part of his baggage on his return to the United States on September 22d, 1878, after a trip to Europe.

The plaintiff claimed, on the examination of his baggage by the customs officers, that the articles in question were exempt from duty.

But his claim was not allowed, and in order to obtain possession of the property, he paid the duties under protest;—appealed in due form to the Secretary of the Treasury, who sustained the action of the Collector—and thereupon this action was brought in due time.

The articles in question, their values and the duties exacted, were as follows, viz.:

	Value.	Rate.	Duty.
On 45 lbs. wool and worsted wearing apparel	$990	50c. lb. $22 50 40 p. c. 396 00	$418 50
On cotton wearing appeared	150	35 p. c	52 50
On leather gloves	250	50 p. c	125 00
On silk wearing apparel	2,140	60 p. c	1,284 00
	$3,530		$1,880 00

Record fol. 32.

All these articles were part of the personal baggage of six members of the plaintiff's family, viz: himself, Mrs. Astor, their son and three daughters.

Record fol. 31.

The plaintiff's uncontradicted testimony was that those articles which were for his own and his son's use, "were such articles of wearing apparel *as they ordinarily wore at that season of the year*, (Record fo. 33); that they "were purchased by plaintiff with the inten-

" tion of using them wherever he and his family might
" be ; that he did not know, when he purchased them, 7
" how long he was going to remain abroad," (Record
" fo. 39), and that "when they were purchased at Paris
" and sent home, *they were placed in with their other*
" *wearing apparel so as to form part of their ordinary*
" *wardrobes ; that* if they had been detained in Europe,
" *the garments were such as they would have required the*
" *moment the weather grew cool, and that they were bought*
" *for use whenever the weather should make it proper to use*
" *them and without reference to where he or his son should*
" *be at the time they encountered cool weather.*" (Record
fo. 40.)

Mrs. Astor's testimony, also uncontradicted, was as 8
to those articles which were for her and her daughter's
use.

" That said garments were intended for the separate
" and individual use of herself and daughters *as soon as*
" *it was cold enough to wear them for the approaching*
" *season ;* that some were adapted for ordinary wear,
" and some for balls and entertainments, and *that all*
" *were made upon measure. That the aggregate*
" *quantity of wearing apparel which formed part of the bag-*
" *gage of herself and daughters fell short of their usual*
" *supply of such articles for that season of the year.* * * *
" That none of said articles were purchased for sale or 9
" exchange, but only for the special use of the persons
" for whom they were made. *That when they were pur-*
" *chased* and sent home from the persons who made them,
" *they were placed indiscriminately in with the wardrobe of*
" *the particular person for whom they were intended, so as to*
" *form part of the personal wardrobe of the person at that*
" *time.* That a great part of them had been worn before
" witness returned to this country, *but some few had not*
" *been worn, because there was no special occasion to wear*
" *them. That if the party had been detained in Paris and*

10 "*cold weather had suddenly come on, the articles were such*
"*as witness and her daughters would have required for im-*
"*mediate use, and that if they had remained for the winter*
"OR A MONTH LONGER, *they would have worn the dresses*
"*intended for entertainments.*"

"That from the time when these articles were pur-
"chased, there was nothing to prevent their being put
"on and worn the moment that a proper occasion for
"wearing them arrived."

"That the articles lasted through the fall and win-
"ter until spring, and had been consumed by use."

11 (Record fols. 40-42.)

The plaintiff also put in evidence the regulation of the Treasury Department of the United States, which was in force from 1857 to 1875, as follows, to wit: "Such exemption of wearing apparel cannot be with-
"out limit as to the character and quantity of the ar-
"ticles which are to be admitted to free entry; and it is
"for the Department or its officers to determine
"whether articles for which exemption is claimed, are
"entitled thereto under a reasonable construction of
"the law.

12 "The rule by which the Department usually deter-
"mines the dutiable or free character of wearing ap-
"parel in such cases is as follows:

"1st. Did the owner visit the foreign country for
"the purpose or with the intention of purchasing the
"article or articles?

"2nd. Were the articles intended for the sole use of
"the person purchasing the same?

"3rd. Was such purchase actually necessary for the 13
"health or comfort of the person or persons purchas-
"ing the same?

"These questions must be answered under oath.

No testimony was offered to contradict the above facts.

But the learned Circuit Judge, refusing certain requests made by the plaintiff's counsel, instructed the jury in substance that no "*unworn garments*" were within the exemption from duties prescribed by Rev. Stat.'s, § 2,505. Exceptions were duly taken at the 14
time. The jury thereupon rendered a verdict for the plaintiff for only $737, instead of for $1,880, the full amount claimed.

The controversy turns wholly upon the interpretation to be given to tue following sub-division of section 2505, of the Revised Statutes, establishing the Free List, viz:

"Wearing apparel in actual use, and other personal
"effects, (not merchandise) professional books, imple-
"ments, instruments, and tools of trade, occupation or
"employment of persons arriving in the United
"States. But this exemption shall not be construed to
"include machinery, or other articles imported for use 15
"in any manufacturing establishment, or for sale.

U. S. Rev. Stats., 2nd Ed page 489.

Statement of Errors.

The errors claimed to have been committed all occurred in the Judge's charge, and in his refusing to charge, as requested by the plaintiff, in certain particulars.

They are in substance as follows:

17 1. In refusing to charge in accordance with the plaintiff's first five requests, all of which asked for instructions as to the meaning of the Statute, which it was proper and right for the Judge to have given.

2. In refusing to charge in accordance with the plaintiff's sixth request, which was :

"SIXTH. The words, 'in actual use,' not be-
"ing scientific or technical words, should be
"applied in the common and ordinary sense
"in which they would be generally employed.
18 "If, therefore, this wearing apparel, under
"the circumstances disclosed in the testi-
"mony, would be generally and ordinarily
"described as being in actual use of the
"plaintiff and his family, then it should have
"been admitted duty free. (Record, fo. 52)."

3. In refusing to charge, in accordance with the plaintiff's seventh and eighth requests, both of which asked for instructions as to the meaning of the words "in actual use," as they occur in the Statute, which it was proper and right for the Judge to have given.

18 4. In refusing to charge, in accordance with the plaintiff's ninth and tenth request, which were as follows :

"NINTH.—Wearing apparel is properly and
"strictly in actual use from the time when its
"use by the owner begins, until it is finally
"consumed or worn out."

"TENTH.—The use of wearing apparel,
"which is purchased for the immediate per-

"sonal comfort of the owner, may be properly 19
"said to begin from the time when it is sent
"home from the maker, and takes its place,
"ready for wear, in the owner's wardrobe.

"If these articles were in that condition,
"they were in actual use within the Statute,
"and should have been admitted free."

5. In refusing to charge, in accordance with the plaintiff's eleventh and fourteenth requests—both of which asked for instructions as to the meaning of the Statute, which it was proper and right for the Judge to have given.

20

6. In refusing to charge in accordance with the plaintiff's twelfth request, which was as follows:

"TWELFTH.—Wearing apparel suitable for
"the season of the year which was approach-
"ing at the time, not exceeding in quantity
"what the owner would ordinarily provide
"for himself and keep on hand for his reason-
"able wants, and purchased for his own use,
"as occasion may require, may be properly
"said to be 'in actual use' within the meaning
"of the Statute, from the time when they
"come in the owner's hands, and are placed 21
"in his wardrobe, to be worn whenever the
"proper occasion arrives, and if these articles
"come within that test, they should have
"been admitted free."

7. In refusing to charge in accordance with the plaintiff's thirteenth request, which was as follows:

"THIRTEENTH.—The terms 'in actual use,'

"as employed in the Statute, are substantially
22 "equivalent to the words 'in present use,' in-
"cluding in their meaning not merely a refer-
"ence to the actual present, but to so much
"of the immediate future as a person would
"ordinarily provide for in his every-day ward-
"robe, and it, in this sense, these articles were
"'in actual use,' they were exempt from duty."

8. In charging the jury that, "although the clothing
"in question was confessedly not excessive in
"quantity for persons of the means, habits and
"station in life of the plaintiff and his family,
23 "and was their ordinary outfit for the winter,
"The exemption of wearing apparel from the
"payment of duty was limited to wearing ap-
"parel which had been actually used as such
"before the arrival of the owner in this coun-
"try."

9. In charging the jury "that the terms 'wearing ap-
"parel in actual use' (not merchandise) as con-
"tained in the Statute, meant 'wearing apparel
"bought for personal use and not for sale,
"which had been really subjected to use in the
"way in which that particular wearing apparel
24 "is ordinarily used,' and that the 'unworn goods
"of the plaintiff,' in this case, were not exempt."

POINTS.

25

FIRST POINT.

The learned Judge should have granted the plaintiff's sixth request—which was as follows:

"Sixth. The words 'in actual use' not being scientific "or technical words, should be applied in the com- "mon and ordinary sense in which they would be "generally employed.

"If, therefore, this wearing apparel, under the "circumstances disclosed in the testimony, would 26 "be generally and ordinarily described as being "*in actual use* of the plaintiff and his family, then "it should have been admitted duty free."

I. The object, and effect, of this request was to keep distinct the proper functions of the Court and the jury, the former being bound to determine the *sense* in which the words were used, and the latter to determine whether the *facts as proved* tallied with that sense.

II. It cannot de doubted that these words "in actual use" were employed in the common and ordinary 27 sense, whatever that might embrace.

Whether the circumstances under which the plaintiff and his family acquired and held these articles at the time were such as would bring them within the scope of these words in such a sense, was really a question of *fact*, and should have been left to the jury.

SECOND POINT.

28

The learned Judge should also have granted the plaintiff's ninth and tenth requests, one of which led on to the other, and which were as follows:

"Ninth. Wearing apparel is properly and strictly '*in* "*actual use*' from the time when its *use* by its "owner begins until it is finally consumed or worn "out.

"Tenth. The use of wearing apparel, which is pur- "chased for the immediate personal comfort of "the owner, may be properly said to begin from
29 "the time when it is sent home from the maker "and takes its place, ready for wear in the owner's "wardrobe."

I. The first of these two requests (the ninth) is axiomatic, and is only intended to explain and support the request that followed it.

II. It is respectfully submitted that the tenth request states the correct rule by which to determine when the "actual use" of wearing apparel begins, and it should have been granted.

It presents the only *reasonable* rule for the in-
30 terpretation of this statute.

1. This rule requires that the articles should have been purchased for the *immediate* personal comfort of the owner.

Every person in every civilized community requires many more articles of wearing apparel than can be put on and worn at any one time.

His or her *actual* wardrobe, at any given moment, *does* and *must*, embrace a number and

variety of articles adapted not only to the changes of the weather, but also to the requirements of cleanliness, and to the different exigencies which arise out of his or her social surroundings. 31

Therefore, if a man,—he must have heavy garments for cool weather, and light ones for warm; plain garments for ordinary service and finer ones, and of different make, for dress occasions. And, if a woman, a greater variety and a larger assortment is practically necessary. As society exacts from her more attention to dress, and binds her to more rigid rules of etiquette than it applies to the opposite sex the provision which she needs to make, *and keep up at all times*, must be proportionately greater and more profuse. 32

But whatever that assortment may be, whether for man or woman, the aggregate amount of what the person requires, in order to be properly equipped for his or her "*immediate personal comfort*," may be properly described as his or her personal wardrobe and as being *then in* "*actual use.*"

Indeed, the learned Circuit Judge, practically admits that the words "*in actual use,*' may, and must, extend to articles intended for special occasions and changing states of weather; and no one could deny that Congress intended to exempt from duty, not only the coat which the passenger wears ashore, the linen which is on his back, and the gloves which he actually carries, but those other articles in his trunk which he may require, to replace the others when soiled by use, or defaced or torn by accident, or to adapt his costume to the daily changing exigencies of his life. 33

34 2. And if this be so, then it inevitable follows that this, collection of articles—constituting everyones present wardrobe, and requiring to be constantly renewed,—must at all times contain, like the King's treasury, "things *new* and *old*." But, whether *new* or *old*, if the articles are required for the "*immediate personal comfort*" of the owner, they are all equally *in his actual use* (*because necessary for his personal use*), whether they have just been added to the stock to replace their discarded predecessors, or are themselves far advanced towards the point at which they must themselves be in turn dis-
35 carded and replaced.

It is therefore respectfully submitted that the owner's use of these articles *begins* the moment they are sent home from the makers, and take their place, ready for use in his wardrobe.

This rule makes the test of "actual use" to depend upon the *immediate necessities* of the owner to have such articles *for use*, and not upon the actual or comparative *newness* of the articles themselves.

3. Such a rule is *reasonable*, and any different rule
36 would be *unreasonable*.

It is easy to understand why no one should be permitted to bring in free of duty articles not honestly intended for his actual and present necessities. But it is difficult to understand why a distinction should be made between the coat which he has worn and is almost ready to throw away, and the coat which he has purchased for immediate use upon occasions for which the other would be too shabby; between

the new business coat which he *wears* on the voyage, and the new dress coat which he *expects to wear for the first time* on the *evening of his arrival home* 37

Indeed, it may be confidently asked whether a rule resting upon such distinctions does not turn legislation into a farce, and make this exemption from duty something dependent not upon any sensible idea, but upon the mere chances of weather and circumstance.

THIRD POINT.

38

The learned Judge should have granted the plaintiff's twelfth request, which was as follows:

"TWELFTH.—Wearing apparel *suitable for the season* "*of the year which was approaching at the* "*time, not exceeding in quantity what the owner* "*would ordinarily provide for himself and keep* "*on hand for his reasonable wants, and pur-* "*chase for his own use, as occasion may require,* "may be properly said to be '*in actual use,*' "within the meaning of the Statute, from the "time when they come into the owner's hands and "are placed in his wardrobe, to be worn when- 39 "ever the proper occasion arrives; and if these "articles come within that test, they should have "been admitted free."

This request embraces the same rule which was asked to be applied, in and by the ninth and tenth requests, except that it adds the qualification that the wearing apparel, claimed to be in actual use, must be such as is "*suitable for the season of the* "*year which is approaching at the time, and not*

40 "*exceeding in quantity what the owner would* "*ordinarily provide for himself, and keep on* "*hand for his reasonable wants.*"

Certainly, if this request had been granted, the uncontradicted testimony of Mr. and Mrs. Astor would have entitled them to recover their full claim here.

Record fos. 40-44.

I. All persons must supply their wardrobe *in advance of the changing seasons, and in advance of their actual wants.*

41 No man can delay providing himself with warm clothing till cold weather actually comes · nor can any lady safely delay the purchase of a dinner dress until actually invited to such an entertainment.

In practice, therefore, everyone's wardrobe at all times contains articles which are not to be *worn* immediately, though there is an *immediate necessity to have them.*

II. The *use* of such articles cannot be restricted to the period when they are actually *on the owner's person.*

42 They must also be considered "*in actual use*" while hanging up in the closet or placed in a trunk, awaiting *an occasion to be worn.* Otherwise the exemption from duty must be confined to what the passenger *wears on his back*, which has never been contended.

But, if such articles are still in actual use *at any time* while hanging in a closet, or placed in a trunk, *awaiting use*, why should not that actual use commence when *they are first so placed to await such use?*

Can it be that, as to such articles so situated 43
an *actual putting on and wearing of them* must take place before they can be said to be "*in actual use.*" It so, then the exemption granted by the statute would not extend to a single fresh pair of gloves—to the ordinarily supply of linen —to a pair of overshoes, or an umbrella, which the exigencies of the voyage had not called into use, or to the thousand and one things pertaining to a lady's waadrobe, which she mus, have at all times about her, *ready for use*, but which she can in the nature of things only wear occasionally.

44

FOURTH POINT.

The learned Judge should have granted the plaintiff's thirteenth request—which was as follows:

"THIRTEENTH, The terms "*in actual use*" as "employed in the statute, are substantially "equivalent to the words "*in present use*," in- "cluding in their meaning not merely a reference "to the actual present, but to so much of the *im-* "*mediate* future as a person would ordinarily " provide for in his every day wardrobe, and if, 45
" in this sense, these articles were "*in actual* " *use*" they were exempt from duty."

1. This request turns upon substantially the same considerations which have been already pressed upon the Court.

If the word "*actual*" is equivalent to "*present*"—as it etymologically may be—then it is impossible to exclude from its scope a certain portion of the *future*.

46 In speaking of wearing apparel—as in *present* use—it is impossible to ignore the fact that its *chief use* must always be in the future.

In fact the *only* use which the wearer can have of any garment must be—not in the *past*, but in *future*.

2. Whatever has *finished* its service, and is not fit for *continued* use, is of course thrown away. Every garment which remains in the owner's wardrobe is kept for a use.

Yet if these words "in actual use" do embrace *any* future use, why should they not embrace *all* 47 future uses, which came within the scope of what we ordinarily call "*the present.*"

Why therefore, was it not correct to claim that the words "*wearing apparel in actual use*" should include such articles as a person would ordinarily provide himself with for the *immediate future* as forming a part of the *actual present.*

3. Yet if this interpretation had been accepted, and if the request had been granted, (thirteenth), the testimony in this case shows abundantly that the provision made by Mr. and Mrs. Astor, and their family was *all* within the limit thus established.

48 (Record fol. 41.)

Mrs. Astor in particular testified that the provision for herself and daughter, "rather *fell short of their* "*usual supply of such articles for that season of the* "*year.*"

FIFTH POINT.

49

The learned Judge erred in making the fact of *an actual previous wearing* the only test of whether the articles in question were, or were not, "*in actual use*" within the meaning of the Statute.

I. The Statute does not *say* that the articles must be *worn* once or twenty times.

If, therefore, the terms "*in actual use*" can receive a reasonable interpretation in harmony with the apparent purpose of the Statute, without regard to whether the articles have been *worn or not*, there is nothing to make that test compulsory in this case.

50

II. It is impossible calmly to read the sub-division in question without seeing that what Congress *intended* was to exempt from duty *all* those articles of personal use which travellers ordinarily carry with them as their *accustomed outfit*, without special regard to whether they have been *worn* one or more times.

This general conclusion, which is a matter of first impression, is confirmed by a more careful consideration of the purpose and effect of this section.

51

III. The primary object of tariff legislation is to raise a revenue from *commerce*. From this, as its chief source, the U. S. government derives its means of support. Hundreds of articles properly designated as "wearing apparel and personal effects," are subjects of commerce, and are imported in

vast quantities *for sale as merchandise.* Upon
52 these articles it was, of course, intended to impose a duty, *because they form a part of the nation's commerce.* These articles must be regularly entered, in the usual way, with production of invoice, valuation by appraisers, and all the machinery prescribed for the ascertainment and exaction of the proper duties.

But Congress has also made a certain exception to the general imposition of duties on such articles, which exception is now embodied in the sub-division of Section 2505 of the revised Statutes now under discussion. In interpreting that
53 sub-division, it is essential to consider upon what *principle* this exemption rests, and then to carry out that *principle* in applying the sub-division. It is, therefore, appropriate to ask, why should *any wearing apparel and personal effects* be relieved from payment of the duty imposed upon such articles generally? What was presumptively the legislative reason for so exempting them? The language of the sub-division itself discloses the reason, viz., because they constitute part of what is commonly known as "*traveler's baggage,*' and are not intended as *merchandise*, but for "*actual use.*" In other words, they form no part
54 of the nation's *commerce*, upon which the Act imposes its duties.

It would, indeed, be taking a narrow view, to deal with the "*baggage*" of travellers, as if it were a subject of *commerce*, and to impose duties upon it as upon a regular *importation of merchandize;* to treat the traveler as if he were an *importer,* and to compel him to *enter* his *baggage* at the custom house in the manner provided for merchandize, and go through all the formalities imposed by the Revenue Laws.

Yet if any portion of such legitimate and proper "baggage" is held to be subject to duty, then it must be on the ground that Congress did intend, in its tariff legislation, to tax something more than the *commerce* of the country. Is there any ground for such an assumption? 55

Is it not more natural and correct to assume, both upon the general scope of the act, and upon the language of this subdivision of section 2505, that the "wearing apparel and personal effects" of persons coming into the United States, were exempted from duty, simply *because* they were "*not merchandize.*"

56

Such an assumption would make the *exception* harmonious in principle *with the Act itself.* "Wearing apparel, and personal effects" when they constitute a part of the country's *commerce*, must pay duties like other merchandize. But when they are in no sense "*merchandize*," but are brought as the personal *baggage* of their owners, they are to be *exempt* from duty, because they *do not constitute any part of such commerce.* "*Cessante ratione., cessat et ipsa lex.*"

It is respectfully submitted that no other reason can be given for this exemption, and until some other reason is given, this may safely be 57 assumed to be the *principle* which underlies this legislation.

It, therefore, only remains to consider whether this subdivision of section 2505, can be interpreted and applied *upon this principle.*

IV. The learned judge below paid no heed to this principle in *his* interpretation of this sub-division.

58 He took a position which did not rest at all upon the question, whether the articles were *merchandize* or not; but which attributed to Congress something more than an intention to levy duties upon articles of *commerce*, and to exempt articles of *personal use*.

He in effect ascribed to Congress an intention to *discriminate between the different articles of which each passengers baggage must consist*, and though *all* of them were admitted to have been brought in *for his own use*, and not as *merchandize*, he held that Congress *intended* to deal with *some of them*, as though they *were* merchandize, 59 and with *others* as though they were *not*.

He held in short that the point upon which this legislative intention turned was, *a single bona fide wearing af the articles*.

This is clearly the purpose and effect of the learned judge's charge.

Is there any ground for ascribing to Congress such an intention?

60 V. Can any reason be given why Congress *should wish* to draw that line of distinction between articles of the same kind, when contained in travelers trunks?

Upon what principle can Congress be supposed to have acted—if it did intend to declare that garments purchased abroad for the owner's immediate personal use, should be *exempt* from duty, if they had been worn *once*—but *dutiable* if if they had not.

This *wearing test* must lead to strange results if carried out. Can those results be justified upon any *principle* which would be worthy of dignified legislation. 60

Test the doctrine by the following illustrations: A passenger, before sailing from Europe, supplies himself with certain articles of acknowledged necessity, without which he could not safely attempt the voyage. A previous shipwreck—a railway collision—or an hundred other accidents —may have destroyed his previous wardrobe, and compelled him to purchase everything new, and *at the last moment before his departure.* His simple inventory may embrace nothing more than two ordinary suits, an overcoat, two pairs of shoes, 62 and a dozen shirts.

He may be compelled by illness to keep his berth during the whole voyage.

He may be accompanied by a companion, *who*, though having lost *his* wardrobe by the same accident, and replenished it with the same articles, purchased at the same time—is in better *health*, or a better sailor, and therefore able to be on deck, and *to wear his clothes.*

According to the *wearing test* laid down by the learned Judge below the custom's officers—in 63 order to *carry out the legislative intention of Congress*—must exact duties from the *one* passenger, on the very same articles which they must allow the *other* to bring in free.

Nay, more; if the well passenger wears but *one* of his two coats, one pair of his shoes, and only a *portion* of his linen, the *wearing test* must make the *other coat, the second pair of shoes, and the*

rest of the linen, dutiable. And although he cou'd
64 not, without great risk, have omitted to provide himself with his overcoat, *its* dutiable character must absolutely depend upon the *nature of the weather at sea.* Cold weather, requiring him to put it on, will make it *free.* Warm weather will make it *dutiable*

Yet these results are not wholly beyond the control of either of these passengers. If they only understand the *legislative intention* (*t*) in regard to their clothing, (as that intention is declared by a Judge below), with a little prudence and a little
65 effort, they can each escape scot free. The well one, by varying his costume *one day* on the voyage, and by facing the contingency of landing here without any fresh linen, can very *easily* bring himself within the exemption *intended* by the statute. Instead of wearing the same coat and shoes during the whole passage, he need only put on the others and wear them *one day*, and he thereby *complies with the condition* upon which they are to be admitted free. And as to his linen—what person who has ever made an ocean voyage in any steamship could impeach the bona fides of the man who found occasion to change his linen more than once a day.

66 The sick passenger might have to make a great effort, but if he is equal to it, and does manage honestly to get up and *wear* his clothes on deck and elsewhere, he too will be rewarded for his heroism by *exemption from duties.* All that the statute requires—according to the charge of the learned Judge below—is a *single bona fide wearing on a proper occasion. True* the passenger cannot bring in anything which is not suitable and intended for his own use at the time. But,

even if those conditions are complied with, according to the learned Judge below, those very articles are to be *dutiable* or *free*, according to the contingency of a *single bona fide wearing.* 67

These illustrations may seem tinged with absurdity, but they are presented in all seriousness.

Can the charge below—that "*unworn goods*" are not exempt—have any other legitimate application than that which is here given to it? And does not every arriving steamship, in its assortment of passengers who have been *well* or *sick* on the voyage, present many cases which, though of course upon different facts, would give equally ridiculous and unsatisfactory results from the interpretation of this statute according to the *wearing test.* 68

It is respectfully asked whether anyone can claim that Congress, *in arranging its revenue system*, really *intended* to draw the line of exemption where this test would place it, and to make such distinctions as this test must surely make if honestly applied between *similar articles* in the baggage of *different passengers* and between the *different articles* of equal necessity in the baggage of *each passenger:* 69

Can it be seriously believed that Congress intended to *except from this exemption* of a ladies wearing apparel, every fresh pair of gloves, every unworn slipper, every unused pocket handkerchief, the ribbons and laces which she expects to wear about her throat at coming festivities; and that *it intended to admit to such exemption* those same articles provided she can assure the customs officer under oath that she has actually worn them *once.*

70 The upholders of this wearing test may be asked *in vain* for any *principle* on which to found it, unless they claim it as the recognized policy of this great nation to encourage—if not to force—every person coming to our shores to *wear old clothes.*

It is our proud privilege to invite all the inhabitants of the earth to come to this free and happy land, and we do it openly. We invite the laborer and mechanic that they may escape oppression; the man of science and learning, that they may impart to us the fruits of their
71 study; the rich and influential, that they may experience our hospitality and observe our model institutions. With what face can we explain to these different guests that, although our invitation is indeed a cordial one, they should be careful not to bring with them any really *new* articles of wearing apparel; that they, and their wives and daughters, must not provide themselves with anything intended to grace *for the first time* the entertainments we have prepared for them, unless they are prepared to contribute to the support of the government at the rate of 60 per cent., on their silk garments, 35 per cent., on those made of cotton, 50 cents per pound,
72 and 40 per cent. ad valorm on their woolen wraps, (which they may not have *needed* at home), and 50 per cent on all their gloves. They may be coming to spend a life time, or only on a visit of a few weeks. In the latter case, they may take back their wearing apparel n the same *unworn* condition in which they brought it. Yet in every case, if the doctrine, which the learned Judge below adopted, is allowed, all of these persons *must pay duties* on whatever *is new* in their baggage. Such is (according to him) the

expressed intention and policy of this free and enlightened government. But, as it were, to soothe their pardonable disappointment and to check any impatient inquiries which they might be disposed to make concerning the *extent of our freedom of our enlightenment*, we are permitted to add that these exactions will be dispensed with, if they will only postpone their visit to our shores until they shall *have honestly* worn everything at least *once* at home, or if they will make *our* entertainments the *second* on their list. All that this government requires, (according to the charge in the Court below) in order to make its revenue system harmonious and satisfactory, is that they should either wear their garments *once, or pay the duties.* 73 74

It may safely be asked whether it is not possible that the learned Judge below may have *made a mistake* in ascribing to Congress the intention of applying to this sub-division a *test* which is capable of producing such results.

VI. But the advocates of this *wearing test* will insist that, *whether it can be justified upon principle or not*, the words "*in actual use*" can only be satisfied by the application of that particular test. 75

Is this correct?

If it is, the intention must be found in the employment of the little preposition "*in.*"

Does that preposition so clearly change the *apparent policy* of our revenue system?

The words "*in actual use*" must either be construed *literally*, or in a *more or less extended sense.*

76 If they are construed *literally*, then nothing can be free but the clothes upon the passenger's person. Considerable expansion must be given to these words to make them include the contents of the passenger's trunk which have been previously used, but which are not at the moment of landing *actually being used*. The learned Judge below freely extended the meaning of those words thus far, but not farther.

77 Yet, if the sense is to be *at all extended*, why should it not be extended *far enough* to rest the *imposition of*, or *exemption from*, duties upon some *principle* which Congress may be supposed to have had in view, both in imposing them and in exempting therefrom? As has been said before, no such principle can be found except that which makes the imposition or exemption turn upon the fact whether the articles are really *merchandise or not*.

78 If, therefore, in addition to their not being merchandise, the articles are proved to be "*suitable* "*for the season which is approaching at the time* "*not exceeding in quantity what the owner* "*would ordinarily provide for himself and keep* "*on hand for his reasonable wants—and pur-* "*chased for his own use as occasion may require.*" it is respectfully submitted that *no principle* can be stated which would take such articles out of the *exemption* which this section *intended* to furnish.

See plaintiff's twelfth request, Record fol. 54.

SIXTH POINT. 79

The doctrine presented by the plaintiff below, in his requests to charge, is not only the *correct doctrine* according to every intelligent or reasonable interpretation of the statute, but it alone is worthy of a civilized government, and is alike protective of the *just rights* of the citizen, and the true interests of the government.

I. Certainly civilization has made but little progress here, if congress really has adopted a policy of taxing articles of *personal clothing* intended for the owners own use, and, not excessive in quantity, or extravagant in quality. 80

No other civilized nation has such a policy.

And if it is *intended* to raise a national revenue on *personal clothing at all—why exempt any?* Why should the coat which has been worn only *once* or *twice*, or *twenty times*, be exempted from the duty which the *unworn* coat must pay? If the country is in such straits for revenue that a lady's dress, fresh from the milliners hands, must must pay a duty,—what false economy for the nation to allow that lady to escape the duty of some hundreds of dollars, by honestly wearing it at 81 one or two balls.

The truth is, Congress should have gone further than it has, according to this doctrine, or else not so far. If it exempts any portion of a traveler's *legitimate wardrobe*, it should exempt it ALL. If it taxes part, it should exempt *nothing*.

II. But it may be urged that the doctrine contended

82 for by the plaintiff would be prejudicial to the government, and allow too many articles to come in free.

It may be answered that if such is the intention of the statute it should be carried out, whatever the consequences.

But it may also be said that this great country could well afford, if need be, to allow all persons coming to this land to bring in, *duty free, all* articles of wearing apparel (*whether new or old*) which they require for their own personal and present use, including in the term "present" such
83 a portion of the "immediate future" as everyone must provide for.

The limits of this exemption are sufficiently narrowed by restricting it to articles intended for the owner's "*immediate personal comfort.*"

See plaintiff's Tenth Request Record, fol. 53.

No real harm could come from such a doctrine. Other nations, having heavier public debts than ours, have not been ruined by such a policy, and it is confidently believed that we too can *bear*
84 *the strain.*

This Court need hardly feel itself impelled by the *necessities of the country* to lean towards the government in interpreting this statute.

III. Should it be further urged that the *plaintiff's doctrine*—which would exempt all wearing apparel brought by passengers for their own immediate use provided it be suitable to their

station, and not excessive in quantity, whether worn or not—would be too vague and indefinite to be applied in practice; the answers are very simple. 85

1. *Whatever* doctrine is adopted in this matter, its application *must be left* in the first instance to the customs officers, with a considerable latitude of discretion.

The examination of Mr. Welsh, the government witness in this case, shows that this discretion is *not avoided* by attempting to apply the *wearing test.* 86

Record, fols. 45 to 50

Indeed it is respectfully submitted that the customs officers can *better determine* what articles are *suitable* and *not excessive* in each passenger's trunks—than they can determine whether the passenger is *telling the truth as to the fact of wearing.*

2. No fear need be felt that the government will be *imposed upon* by adopting the plaintiff's doctrine.

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The chances of imposition are no greater, whichever doctrine is adopted, and the government has complete protection at all times, because in every suspicious case the customs authorities can always *exact the duty*, and leave the passenger to recover it back *through the Courts.*

Indeed, if regard be had, not only to the provisions of the statutes, but also to the fre-

quent experiences of travelers, it can hardly
88 be thought that the *government* is the one who is most in danger of suffering from the discretion of the customs' authorities.

3. And, lastly, the fact that from 1857 to 1875—a period of nearly twenty years—the customs officers, *acting under explicit instructions from the Treasury Department*, did apply the plaintiff's doctrine, shows conclusively that its application is neither difficult nor inconsistent with the national welfare.

89 IV. Any other doctrine is an unnecessary encroachment upon the rights and privileges of individuals.

It is not denied that Congress *can* lay a duty upon a traveler's baggage, if it choses to do so. But such a duty must be levied at the expense of much hard feeling, and a sense of individual oppression. It is impossible to tax any man upon the garments, whether new or old, which he is *obliged to provide himself with*, and at the same time to persuade him that he is in a *very free country*. Such exactions have ever
90 been confined to countries where despotism prevailed and freedom was a stranger.

They were common in Russia under the old regime; in France prior to the second empire; in Naples under the Bourbons. But at the present time, they are practically unknown throughout the continent of Europe, and in many parts of Asia and Africa.

Yet in this country they are adhered to, and this Court is now asked to confirm a doctrine,

which will subject, and does now daily subject, travelers coming to this free republic, to exactions which they would never encounter in any other country in the civilized globe. 91

It is confidently asserted that in no country in the world is the Custom House so dreaded by the *honest traveler* as in the United States, and that, as our laws are now administered, a person coming from the East through Egypt, Italy, Germany, France and England, *and stopping in each country on his way*, will pay upon his personal effects on landing in New York, at a low estimate, *three times as much in the shape of duties* as he will have paid in his whole previous journey. 92

If the Court shall think that Congress has expressed its intention to impose such exactions, of course it must carry out that intention.

But it is respectfully submitted, *it has not.*

And this Court is now asked to seriously consider whether this pretended *exemption* of traveler's baggage, ostensibly provided by our laws, is the mean and niggardly thing which it is now interpreted as being, or whether it is a substantial and dignified concession to the reasonable convenience and comfort of travelers. 93

SEVENTH POINT.

The words "*in actual use*," although first introduced into the legislation on this subject in the late revision of the Statutes, cannot be supposed to mark the inauguration of a new and less liberal policy upon this subject.

94 I. This is apparent from the fact that substantially the same form of entry for baggage is still prescribed which was provided under the act of 1799, ch. 128, § 46, in which no such words appear.

The passenger now, as before, is only required to swear, on entering his baggage, "that such packages "contain no *merchandise* whatever other than wearing "apparel, personal baggage, or, as the case may be, tools "of trade, specifying it; that they are all the property "of a person named, who has arrived, or is shortly "expected to arrive, in the United States, and are not "directly or indirectly imported for any other *or*
95 "*intended for sale.*"

Rev. Stat.'s, 2nd ed., § 2779.

II. It can hardly be believed that the introduction of these few words were intended to change the substantial policy of the government in this particular, or to do anything more than to prevent the introduction of wearing apparel which was not the *legitimate personal baggage* of the passenger. It might perhaps have been intended to limit the exemption to what might be a proper provision for the person at the time of his arrival, so as to prevent him from bringing a supply for a life
96 time, or even for future years. But can it be supposed that more than this was intended?

Can it be supposed that Congress then intended not merely to confine this trifling privilege to such articles as were intended for, and essential to, the owners immediate personal comfort, but to exclude from the proposed exemption (among such articles) all those which had not been *previously worn.*

If such *was* the intention, the subsidiary provisions made for carrying out this exemption are singularly at

variance with it; and it would be a backward step in 97
the progress of civilization which would be inconsistent with the spirit of the age, and with the traditions of this country.

It is respectfully submitted that full and sufficient scope to these words was given in the plaintiff's various requests to charge, which the Court below refused; and that it is unnecessary and incorrect to give to them the meaning which the Court below adopted.

EIGHTH POINT.

98

Although the amount involved in this controversy is insignificant in itself, and perhaps more so in connection with the plaintiff's circumstances, yet the principle involved affects at once the present comfort of many persons, and, the reputation of this government. It therefore deserves the serious attention of the Court.

I. It is no secret that the arrival of every incoming European steamship, especially in the port of New York, is the signal for the commencement of a struggle between the government officers, and *all* the passengers, which, to say the least, is most unseemly. The *honest*, as well as the *dishonest*, must brace themselves for this contest, the duration and severity of which must depend largely upon the individual traits of the officer to whom each is assigned. But the fact has been established by too frequent experiences to be questioned, that the piers are often strewn with personal apparel, belonging to persons of the highest integrity, who are obliged, either to debate with an incredulous official the question whether the articles have been *worn* or not, or else to pay the

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100 government on an average, half what the articles themselves have cost.

Let those who have passed the ordeal, fill out the details of the picture. And let any one who has passed it, say what impression it has made upon him concerning the attitude of this government towards its citizens and strangers.

II. It is not intended here to shield the *dishonest*, but the honest only.

Let the custom officers be as watchful as they can be to prevent *smuggling;* and let every one 101 who seeks to *evade the law* take the consequences of his attempt.

But here it is a qustion of *interpreting the law*, and this Court is asked to determine what Congress *intended to allow travelers to carry with them duty free.*

The doctrine contended for by the plaintiff will save many an honest traveler, both man and woman, from annoyances and mortifications which embitter their landing on these shores, and it will place this government on the same dignified position in relation to this subject which other civilized na- 102 tions have long since assumed.

The doctrine contended for by the defendant in error will perpetuate and intensify these annoyances, and will stigmatize this government as most illiberal, inhospitable and penurious. The facts of this very case exhibit that position in a sufficiently unattractive light, where a gentleman of wealth and station, returning to his home in the early autumn and with winter approaching,

accompanied by five members of his family, four of whom were ladies, has been prevented from bringing with him new articles of actual wearing apparel averaging in value less than $600 to each person, except on condition of paying to the government $1,880—a sum equal to nearly sixty per cent. on the whole purchase. 103

If this is the law *it is little to be proud of.*

But it is respectfully insisted that it is *not* the law; that the purpose of Congress in granting the exemption which has here been described, was not so small or niggardly as this case would represent it to be, and that the true interpretation of the statute not only *admits*, but *requires*, a different application of its language than was given to the Court below. 104

NINTH POINT.

The judgment below shall therefore be set aside, and a new trial be ordered. with such an expression of opinion by this Court as will guide the Court below in a correct exposition of the statute.

105

Dated January 30th, 1884.

LORD DAY & LORD,
Attorneys for Plaintiff in error.

GEORGE DE FOREST LORD,
Of Counsel.

111-202

SUPREME COURT U.S.
FILED
MAR 21 1884
H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

ASTOR
vs.
MERRITT, COLLECTOR. } No. 277.

BRIEF FOR THE UNITED STATES.

This is an action to recover duties exacted in excess of law, as is alleged.

The question involved is as to the meaning of the phrase "wearing apparel *in actual use* of persons arriving in the United States," contained in the *free list* of the tariff. (Rev. Stat., p. 489.) More particularly whether it extends to wearing apparel provided for a season which, although just approaching, is different from that of the *arrival.*

The plaintiff in error traveled in Europe from May or June until September 22, 1878. He was accompanied by his wife, two daughters, a son, and two servants. He brought back for himself and family a considerable quantity of silk, woolen, and cotton wearing apparel, "made upon

measure" (folio 41), and also of gloves. Of this the collector separated as dutiable some $3,530 worth, and exacted thereon duties to the amount of $1,880.

The plaintiff claimed that the whole was free, as being "in actual use," within the meaning of the above statute, and thereupon protested and appealed.

This suit was then brought, and upon the rulings below $737 of the duties so exacted were recovered; but the plaintiff excepted to certain other rulings, as appears in the bill of exceptions.

There is no suggestion of *mala fides* in the plaintiff; he made no more than his usual provision for the coming winter.

The plaintiff testified (folio 32), that the articles upon which duty was exacted were intended for the personal use of himself and so much of his family as had traveled with him; and that those bought for his son and himself were such "as they ordinarily wore at that season of the year, and that they were principally intended for use in winter;" that some of them had been actually worn by them personally.

Mrs. Astor testified (folio 40) that such as were for herself and daughters were intended for their use, "as soon as it was cold enough to wear them, for the approaching season."

In considering the correctness of the instructions given to the jury it is to be borne in mind that the apparel in question was really for the approaching winter, although such as might be worn with comfort, of course, during some

days of fall; and that a part of it had in that way actually been worn before *arrival, i. e.*, before September 22.

The question therefore is, whether apparel purchased for an approaching season, some of which, however, had been already worn, is exempt from duty before that season has arrived, on the ground of being "actually in use." As regards apparel proper to a season *current* at the time when the person whose it is arrives in the United States, no question is made that, *bonafides* admitted, every article in the stock of such apparel, whether already used or not, is in a fair sense, "actually *in use*." But as to articles provided for the future, whether so provided in accordance with ordinary *economy* or not, it seems to be otherwise. The obvious policy of the exemption does not extend to such purchases. The statute recognizes that *persons* cannot *arrive* unless then and there *clothed;* it makes no nice distinctions as to what is needed for contemporaneous *clothing* in addition to the suit upon the traveler's person. Betwixt what is thus needed and that which prudence may dictate because of passing *opportunities* for laying in supplies for a future season, there seems to be a substantial distinction, and it is submitted without more said that this distinction is observed in the statute.

In brief, then, the statute makes a distinction betwixt the *traveler* and the *paterfamilias*, intimating that *the* PROVIDENCE *of a traveler in his character as paterfamilias* is entitled to no other treatment than that which is accorded by law to other heads of families who are *untraveled.*

The principle seems to be plain; although in applying it, inasmuch as there is no hard and fast rule by which what is wearing apparel for one must be so for all, it seems